STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **BARN ACQUISITION CORPORATION** for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	
In the Matter of the Petition of **FASHION BARN, INC.** For Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	DETERMINATION DTA NOS. 812740, 812741, 812742 AND 812743
In the Matter of the Petition of **CONSOLIDATED STORES CORPORATION** for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners, Barn Acquisition Corporation, Fashion Barn, Inc. and Consolidated Stores Corporation, 300 Phillipi Road, Columbus, Ohio 43228, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A consolidated hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 29,

1995 at 1:15 P.M. Petitioners filed their brief and reply brief on October 30, 1995 and December 13, 1995, respectively. The Division of Taxation filed its brief and reply brief on October 31, 1995 and December 15, 1995, respectively. The December 15, 1995 date began the six-month period for the issuance of this determination. Petitioner appeared by Battle Fowler, LLP (Richard L. O'Toole, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether the original purchase price for the four "New York Parcels" was properly determined by petitioner.

II. Whether a parent and great-grandparent of a transferor corporation may also be held responsible for the gains tax determined to be due.

FINDINGS OF FACT

Stipulated Facts

The parties agree to this stipulation of facts pursuant to 20 NYCRR § 3000.7.

1. On June 8, 1988, Fashion Barn, Inc., a New York corporation ("Fashion Barn") was owned by eight shareholders, some of whom were individuals and some of whom were trusts (hereinafter referred to as "Sellers"). The Sellers were as follows:

Mr. Peter Vance Rogers
Ronald W. Rogers Cust for
Peter Williams Rogers
10474 E. San Salvador Dr.
Scottsdale, AZ 85258

Mr. Ronald W. Rogers
Peter Vance Rogers Cust for
Kaitlin Crotty Rogers
501 Knollwood Road
Ridgewood, NJ 07540

Estate of Fred J. Rogers
Residuary Trust
c/o Dr. George F. Heinrich
Mainus Drive
Bedford, NY 10506

Estate of Fred J. Rogers
Marital Trust
c/o Dr. George F. Heinrich
Mainus Drive
Bedford, NY 10506

George F. Heinrich, M.D.
Mainus Drive
Bedford, NY 10506

Ms. Helen L. Anderson
One Lincoln Plaza, #12B
New York, NY 10022

2. On June 8, 1988 Fashion Barn owned nine parcels of real property, four of which (the "New York Parcels") were located in New York State. The New York Parcels were as follows:

42-99 Francis Lewis Boulevard Bayside, New York	18 Haven Avenue Port Washington, New York
34-45 Francis Lewis Boulevard Bayside, New York	1480 Forest Avenue Staten Island, New York

3. On June 8, 1988, Barn Acquisition Corporation ("BAC") entered into a Stock Purchase Agreement with the Sellers, pursuant to which BAC acquired the shares of Fashion Barn from the Sellers on June 8, 1988. Section 2.02 of the Stock Purchase Agreement provided that, as the purchase price for the stock of Fashion Barn, "Buyer shall pay to Sellers an aggregate of $6,200,000.00, payable as follows:

(a) $4,450,000.00 has been paid to the Sellers;

(b) $1,750,000.00 is being paid simultaneously herewith by wire transfer of federal funds to the account of . . . the Escrow Agent . . . ."

In addition, Section 3.13 of the Stock Purchase Agreement and the Closing Date Statement provided that Fashion Barn was subject to approximately $8,100,000.00 of liabilities.

Section 9 of the Stock Purchase Agreement provided in part that: "Any transfer taxes applicable to the conveyance and transfer to Buyer of the Company Stock shall be paid by Sellers."

The Stock Purchase Agreement did not apportion the amount of consideration paid by BAC to acquire the shares of Fashion Barn to the real property then owned by Fashion Barn.

4. On December 23, 1991, the Department of Taxation and Finance (the "Department") issued a Notice of Determination (L-004962042-1) to BAC, as transferee of 100% of the shares of Fashion Barn, wherein it determined that the consideration paid by BAC to the Sellers for the shares of Fashion Barn that is attributable to the New York Parcels was $10,700,000.00. However, the Department is cancelling this Notice of Determination in light of a settlement having been reached with the Sellers.[1]

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[1]A Notice of Cancellation of Determination and Discontinuance of Proceeding was executed by the Division of Taxation's representative on June 29, 1995 In the Matter of the Barn Acquisition Corporation (DTA# 812741) for assessment number L004962042.

5. In August 1988, Fashion Barn filed a Chapter 11 bankruptcy petition. From December 1988 through March 1989, while formulating a plan of reorganization, Fashion Barn sold the New York Parcels to third-party purchasers for $8,615,000.00. At the time of each sale, Fashion Barn properly filed a Form TP-580, New York State Real Property Transfer Gains Tax - Transferor Questionnaire, with, and received a Form TP-582, Tentative Assessment from the Department. The filings reflected an aggregate consideration of $8,615,000.00 and an aggregate original purchase price of $10,700,000.00.

6. On or about December 2, 1991, Notices of Determination (L-004903993-2, L-004903994-1 and L-004903995-9) were issued to Fashion Barn, BAC, as owner of 100% of the stock of Fashion Barn and Consolidated Stores Corporation ("Consolidated") assessing a New York State real property transfer gains tax ("Gains Tax") liability of $703,592.00 and interest of $247,217.66. The notices of determination issued to Fashion Barn and BAC stated that the "allocated original purchase price now allowed as the cost basis for the subsequent re-sale of Fashion Barn's New York Real Property has been determined using the best information available on file at this time." All three notices stated that "the original purchase price allowed was derived from the historical costs as recorded on the books and records of Fashion Barn, Inc." A schedule was included with the notices which indicated that the total consideration for the four sales was $8,615,000.00, and that the total original purchase price for the four sales was $948,323.00. The notice to Consolidated did not address why Consolidated should be liable for any gains tax that may have been incurred by Fashion Barn.

7. A Conciliation Conference was held on January 6, 1993. Conciliation Orders were issued by Robert C. Farrelly, Conciliation Conferee, in connection with CMS Nos. 120610 (BAC), 120611 (Consolidated) and 120612 (Fashion Barn), sustaining the notices of determination.

8. Appraisals obtained by Fashion Barn indicated that as of November 1, 1987, the market value of the New York Parcels was $10,700,000.00. The Department reserved its right to submit other evidence of value for the New York Parcels and real property located outside of

New York and did not concede that the market value of the New York Parcels was $10,700,000.00.

The appraisals also valued the five properties located outside of New York State at a total of $3,435,000.00.[2]

9. Fashion Barn was incorporated in 1969 and was engaged in profitable business activities for many years. Fashion Barn entered bankruptcy proceedings in 1988. Consolidated, New England Industrial Products, Inc. ("NEIP") and BAC did not enter bankruptcy proceedings. The shares of Fashion Barn were owned by persons unrelated to Consolidated from 1969 until June 1988.

10. BAC was organized as a Delaware corporation on June 2, 1988. Consolidated caused BAC to be organized for the purpose of acquiring the stock of Fashion Barn.

11. The Written Consent to Action resolved to accept the offer from NEIP to subscribe for 100 shares. There were no other shares outstanding.

12. NEIP is a wholly-owned subsidiary of Consolidated Stores Corporation.[3] It is a corporation that was organized under the laws of Maine on November 1, 1983. The funds for the purchase of the stock of Fashion Barn were transferred from Consolidated to NEIP and then from NEIP to an escrow account maintained by BAC attorneys on behalf of

BAC. The net proceeds of the sale of assets by Fashion Barn were transferred to Consolidated.

ADDITIONAL FINDINGS OF FACT

Findings of Fact "12" through "21" include proposed findings of fact submitted by the Division of Taxation and petitioners which were accepted in their entirety except where they duplicated facts contained in the stipulations of fact.

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[2]Initially, the parties had stipulated that the appraisals valued only four of the five properties located outside of New York State with Fashion Barn not being in possession of an appraisal as to the value of the fifth property, located in Teaneck, New Jersey. However, just prior to the hearing date, petitioners presented the Division of Taxation's representative with a copy of the market value appraisal of this property. The stipulation of facts was modified to reflect this change of circumstances.

[3]In addition, NEIP was the 100% shareholder of BAC.

13. Paragraph 2 of the Stock Purchase Agreement provided as follows:

2. Purchase of Sale.

2.01. On the terms and subject to the conditions set forth in this Agreement, simultaneously herewith, Sellers agree to sell, assign, transfer, convey and deliver to Buyer, free and clear of all liens, claims, charges and encumbrances, and Buyer agrees to purchase and accept from Sellers all of the Company Stock. The shares of Company Stock to be sold and delivered to Buyer by each Seller are as set forth on Schedules 1 and 2, respectively.

2.02. As the Purchase Price for the Company Stock, Buyer shall pay to Sellers an aggregate of $6,200,000, payable as follows:

a. $4,450,000 has been paid to the Sellers;

b. $1,750,000 is being paid simultaneously herewith by wire transfer to federal funds to the account of Battle Fowler, the Escrow Agent to be held pursuant to the terms of an Escrow Agreement (the "Escrow Agreement");

c. The Escrow Agreement provides for the payment to the Sellers (I) of (x) $750,000 upon delivery to Buyer of the report of a physical inventory as contemplated by Section 12 if such report reflects a retail inventory of the Company and its Subsidiaries as of the opening of business on June 6, 1988 in an amount not less than $13,965,000 reduced by $100,000 for each day after and including June 6, 1988 until the date the stores are closed for the commencement of the inventory taking; provided, however, if such report reflects a retail inventory of the Company and its subsidiaries less than $13,965,000 less the $100,000 per day reduction until the date the inventory taking is commenced then in such event there shall be a set off and reduction against the Purchase Price equal to the product of (y) 40% times (z) the difference between $13,965,000 (less the $100,000 per day reduction until the date the inventory taking is commenced) and the actual aggregate retail inventory as certified by the inventory taking service; and (ii) $500,000 upon delivery to Buyer of title insurance policies issued by insurers reasonably acceptable to Buyer insuring title to the Real Property parcels listed on Schedule 2 subject to no material liens, claims or encumbrances that, in Buyer's reasonable judgment, would materially adversely affect the marketability of such parcels. Buyer shall be entitled to use such $500,000 to clear any encumbrances of record evidenced by UCC filings, but only prior to the time of delivery of title policies. The Escrow Agreement further provides that the amount of payments to the Sellers may be offset by the amount(s) (if any) by which the actual liabilities of the Company as of the date hereof (or the date of the actual delivery to the Escrow Agent of the amount referred to in Section 2.02[b], if later) in the line items designated "Unsecured Debt" and "Mortgages on Property in Ohio and Indiana" in the Closing Date Statement (as such term is defined in Section 3.14) or in the aggregate are in excess of the maximum amount(s) reflected

therefor on the Closing Date Statement as contemplated by Section 3.14.

d. The Escrow Agreement provides that if the encumbrance clearance condition referred to in Section 2.02(c)(ii) is not met, the Buyer shall be entitled to apply to the clearance of encumbrances such portion of the $500,000 referred to in Section 2.02(c)(ii) as may be reasonably necessary to clear such title.

e. The escrow agreement further provides th[a]t $500,000 shall be (I) released to Sellers upon the delivery by Sellers of evidence satisfactory to Buyer of the release of discharge of the Company's and the Subsidiaries' guarantee of the obligations of the Saddle Brook Lessor referred to in Section 3.06(a), or (ii) paid to the Buyer as a Purchase Price adjustment to the extent that the Company and/or the Subsidiaries is required to make any payment (s) under such guarantee."

14. Paragraph 4.03(a) of the Stock Purchase Agreement provided as follows:

"4.02 (a) Buyer is purchasing the Company Stock for its own account, for investment purposes only, and not with a view to the resale, distribution, subdivision or fractionalization thereof."

15. The "Closing Date Statement" attached to the Stock Purchase Agreement provided as follows:

"FASHION BARN, INC.

CLOSING DATE STATEMENT

Liabilities		
Trade	$5,160,000	
Unsecured	$1,000,000	
Mortgages on Property in Ohio and Indiana	$ 90,000	
Accrued Expenses (other than trade payables)	$ 500,000	
Due to Franchisor and Customer Credits	$ 525,000	
Vacation Liabilities	$ 350,000	
Sales and Personal Property and Other Taxes	$ 375,000	
Due in re Computer	$ 100,000	
Total Liabilities		$8,100,000
Minimum Cash		$ 200,000"

16. On Schedule B-1 of its Statement of Assets and Liabilities filed with the United States Bankruptcy Court for the Eastern District of New York, Fashion Barn listed the following market values for all nine of its parcels of real property.

"Schedule B-1 - Real Property

1480 Forest Avenue Staten Island, New York	$1,700,000
42-99 Francis Lewis Blvd. Bayside, New York	$2,650,000
34-45 Francis Lewis Blvd. Bayside, New York	$2,625,000
18 Haven Avenue Port Washington, New York	$1,000,000
71 No. Washington Avenue Bergenfield, New Jersey	$ 815,000
444 Cedar Lane Teaneck, New Jersey	$ 518,000
3845 State Road Cuyahoga Falls, Ohio	$ 150,000
4401 South Western Avenue Marion, Indiana	$ 100,000
3412 State Street Santa Barbara, California"	$ 950,000

17. Fashion Barn's gains tax filings included a Coldwell Banker appraisal dated November 1, 1987 for each of the four New York Parcels and the Stock Purchase Agreement. The gains tax filings did not include appraisals for the five non-New York parcels.

18. An August 3, 1988 letter from Keen Realty Consultants, Inc. to Fashion Barn, Inc. provided as follows:

"August 3, 1988

Fashion Barn, Inc.
270 Market Street
Saddle Brook, NJ 07662

Gentlemen:

We have reviewed the information supplied to us by you regarding the nine (9) locations you owe [sic] in fee. The locations are as follows:

42-99 Francis Lewis Blvd., Bayside, NY
34-45 Francis Lewis Blvd., Bayside, NY
1480 Forest Avenue, Staten Island, NY
18 Haven Avenue, New York, NY

3412 State Street, Santa Barbara, CA
3845 Akron Cleveland Road, Cuyahoga Falls, OH
4401 South Western, Marion IN
71 North Washington Avenue, Bergenfield, NJ
444 Cedar Lane, Teaneck, NJ

Based on the information received, Keen feels these properties have a total value in excess of $8,850,000. The final sales price for each location cannot be determined until a full marketing campaign is implemented and the properties sold. It is possible that the final results will probably be in the range from $10,000,000 to $11,000,000.

Should you have any questions, please contact me.

Very truly yours,

KEEN REALTY CONSULTANTS, INC.

/s/

Moe Bordwin
President

MB/mc"

19. At hearing, the Division of Taxation revised its computation of the consideration paid to acquire the interests in the four New York properties using the following methodology:

"Computation of consideration subject to allocation based on relative values of assets:

Stock purchase price	$ 6,200,000
Liabilities	8,100,000
Total Consideration	$14,300,000
Minus: Cash	(200,000)
Inventory	(5,586,000)
Consideration subject to allocation among remaining (i.e., non-cash & inventory) assets	$ 8,514,000

Value of non-cash and non-inventory assets:

1)	New York real property:		
	34-35 Francis Lewis Blvd.	$2,625,000	
	42-99 Francis Lewis Blvd.	2,650,000	
	1480 Forest Avenue	1,700,000	
	18 Haven Avenue	1,000,000	
	Total New York real property		$ 7,975,000
2)	Non-New York real-property		2,533,000
3)	Autos & other vehicles		73,800
4)	Office equipment & supplies		222,000
Total value of non-cash and non-inventory assets			$10,803,800

Proportionate share of remaining consideration (i.e., after direct allocation to cash & inventory) attributable to New York real property:

Value of New York real property	$ 7,975,000
Total value of acquired assets (excluding cash & inventory)	÷ 10,803,800
Percentage of remaining consideration (i.e., after direct allocation to cash and inventory) attributable to New York Real Property	73.82%
Total consideration attributable to non-cash and non-inventory assets	x $8,514,000
Consideration attributable to New York real property (New York consideration")	$6,285,035

Allocation of New York consideration among New York real properties:

Properties	Value	Percentage of Value	Total New York Consideration	Consideration Paid to Acquire
34-35 Francis Lewis Blvd.	$2,625,000	32.91%	$6,285,035	=$2,068,405
42-99 Francis Lewis Blvd.	$2,650,000	33.23%	$6,285,035	=$2,088,517
1480 Forest Avenue	$1,700,000	21.32%	$6,285,035	=$1,339,970
18 Haven Avenue	$1,000,000	12.54%	$6,285,035	=$ 788,143
	$7,975,000	100%		$6,285,035"

20. The numerical analysis presented by the Division in determining the original purchase price of the New York Parcels did not attempt to determine the value of such parcels. The Division's auditor did not inspect any of the New York Parcels nor did he undertake any analysis comparable to the analysis performed by Coldwell Banker in its appraisals.

21. At the hearing, petitioners submitted documentation in the nature of corporate records, SEC filings and tax returns of Fashion Barn, BAC, Consolidated and NEIP.

22. It was in the mid-1980's that Fashion Barn began to experience financial difficulties. One option was to borrow funds with the properties it owned as collateral. It was then that it had Coldwell Banker prepare appraisals of the real estate. The appraisals were to reflect the highest possible value for the subject properties, for use in obtaining financing, assuming the properties were put to the highest and best use. Coldwell Banker specifically prepared the appraisals for financing purposes.

The selling family stockholders of Fashion Barn were introduced to and approached by the Chairman of the Board of Consolidated at the end of May 1988. The sale of all the stock of Fashion Barn occurred on June 8, 1988 and was effectuated by the Stock Purchase Agreement of that date. The selling family stockholders regarded the circumstances of the sale as being a distress situation.

SUMMARY OF THE PARTIES' POSITIONS

23. According to the Division, the inventory was not included in the allocation because the Stock Purchase Agreement had made a direct allocation to inventory. The substance of the transaction was inventory driven. The stockholders of Fashion Barn sold a going concern, and BAC had made specific representations in the agreement that it would remain a going concern, and not be divided up and sold. Fashion Barn was a retail business which made its money through inventory, not real property, and the Stock Purchase Agreement placed the appropriate emphasis upon the inventory of the business.

In addition, the numbers in the Stock Purchase Agreement illustrate that the assets could not have been transferred at their full market value. Instead, there was a discount in the price of the assets, a distress sale due to the impending bankruptcy of Fashion Barn. As the assets were acquired at a discount the auditor spread the discount among all the assets on a relative basis except the cash and inventory.

24. The Division considered the appraisals unreliable for the purpose of determining the value of the New York Parcels upon the sale of Fashion Barn's stock to BAC for several reasons. The auditor used the values in the bankruptcy petition which were considered more creditable because the petition contained all real property, not just the parcels located in New York and it also contained non-real property assets. In order to do the allocation on a relative basis, valuations for all the assets are needed. However, no appraisals were available at the time for the non-New York properties. The auditor was also concerned that the stock market crash of October 19, 1987, which had a negative impact on real property values, was not reflected in the appraisals of the New York Parcels. The auditor was of the opinion that the appraisals prepared for the Fashion Barn shareholders for financing purposes would be biased to inflate the value of the properties to allow for greater borrowing against such properties. Finally, the values in the bankruptcy petition were closer to actual consideration that was realized on the fee sales of the properties than the appraisals.

25. As for the second issue dealing with the assessments against Consolidated and BAC, the Division contends that Consolidated funded, controlled and received all the proceeds relating to the sale of Fashion Barn by BAC. The Division would apply the "look-through" principle to the transaction at issue by equating beneficial ownership of the real property, that is ownership of the real property through an entity, with ownership of the real property. The definition of interest in real property includes a beneficial interest, such as that held by Consolidated and BAC after BAC purchased the stock of Fashion Barn. Finally, BAC was a special purpose corporation created to purchase the stock of Fashion Barn. As a special purpose corporation, it would not be unusual for it to be liquidated after its limited purpose was fulfilled. If the Division was unable to hold the parents liable, it could create an avoidance or escape mechanism for the payment of the gains tax due. The record owner of the property would be gone, having filled its single purpose of acquiring the stock, and there would be no one left to assess.

26. Petitioners contend that in an acquisition of a controlling interest in an entity with an interest in real property, the consideration paid for the interest in real property is equal to the fair market value of the property multiplied by the ownership percentage acquired by the transferee (in this case 100%). Where real property and other assets are purchased, and when no apportionment of the consideration is made by agreement, then the amount of the consideration allocable to the acquisition of an interest in real property is equal to the apportioned fair market value of the real property. Generally, the fair market value of the real property is determined by appraisal. The evidence introduced at the hearing indicated that the fair market value of the New York Parcels on the date of the stock transfer was $10,700,000.00, and in any event was no less than $8,615,000.00, the price paid by unrelated third parties while Fashion Barn was engaged in bankruptcy proceedings and while the overall value of real estate was declining due to the aftermath of the October 1987 stock market crash.

Petitioners take issue with the analysis of the Division which attempted to allocate a portion of the stock purchase price to the New York Parcels. First, the analysis did not attempt

to determine the value of the New York Parcels. Second, the auditor did not visit the properties, did not examine the properties' rent roll and expenses and did not consider the appropriate capitalization rates for the properties. Finally, the analysis does not take into account a number of liabilities of Fashion Barn that did not appear on its balance sheet, such as obligations for wages and under leases.

27. As to the second issue, petitioners argue that neither Consolidated nor BAC was the transferor of the New York Parcels. Fashion Barn was a bona fide corporation that had been in business for many years, and the Division had no basis to assert that either Consolidated or BAC was responsible for the payment of any gains tax liability arising from the transfer of the New York Parcels.

Petitioners further contend that the Division is misapplying the "look-through" concept to the situation at hand. This assertion of liability has no statutory, regulatory or judicial support and would represent an unprecedented expansion of liability for the gains tax. The Division's use of the look-through principle is specific in nature; it has been applied only for the limited purpose of determining whether specific multiple transfers should be aggregated for purposes of applying the $1 million exemption. Petitioners conclude that the use of the look-through principle to expand the scope of the term "transferor" would be an unprecedented expansion of this aggregation principle.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. Section 1440(7) defines a "transfer of real property" to mean:

> "the transfer or transfers of any interest in real property by any method, including but not limited to sale . . . or acquisition of a controlling interest in any entity with an interest in real property."

Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of such property . . . ." The term "original purchase price" is defined as, generally, the consideration paid or required to be paid

by the transferor to acquire the interest in real property, plus the cost of certain improvements and customary expenses as set forth in the statute (Tax Law § 1440[5][a]). The threshold level at which this tax first applies is reached when the consideration for the property transferred equals or exceeds $1,000,000.00 (Tax Law § 1443[1]).

B. The term "consideration" is defined as "the price paid or required to be paid for real property or any interest therein . . ." (Tax Law § 1440[1][a]). Section 1440(1)(c) further provides that:

> "In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest."

20 NYCRR former 590.47(b) and former 590.49(b), relating to consideration and original purchase price, respectively, provided in part as follows:

> "(b) Question: How is fair market value determined?
>
> "Answer: Generally, by appraisal. It is the amount a willing buyer would pay a willing seller for the real property . . . ."
>
> * * *
>
> "(b) Question: Is the original purchase price of the real property as held by the entity stepped-up upon the acquisition of a controlling interest?
>
> "Answer: Yes. In the case of an acquisition of a controlling interest, where the mere change exemption was not applied, the original purchase price in the real property as held by the entity may be stepped-up to reflect the consideration recognized on the transfer of the ownership interest.

C. In essence, it is petitioners' position that their valuations should be accepted because they have established that they more accurately reflect the fair market value of the property. The Division has responded by asserting that the allocation performed by the Division more accurately reflects the price paid by the buyers pursuant the Stock Purchase Agreement.

D. In Matter of Shareholders of Beekman Country Club (Tax Appeals Tribunal, April 16, 1992, confirmed Matter of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989), the Tax Appeals Tribunal concluded that, in the absence of a showing of unreasonableness, an apportionment agreement between the transferors and the transferee satisfied the provisions of Tax Law § 1440(1)(c). Before one may consider an appraisal of fair market value which would alter the terms of an apportionment agreement the party challenging the agreement must first establish that the apportionment is unreasonable. In Beekman, the Tribunal concluded that the petitioners had not established that the allocation agreement was unreasonable through the introduction of a new appraisal because the new appraisal did not follow an acceptable valuation method for determining the fair market value of the property. Namely, it did not reflect "the price a willing buyer would pay a willing seller." (Matter of Shareholders of Beekman Country Club, supra.)

In the proceeding which followed, the determination of the Tax Appeals Tribunal was confirmed (Matter of Shareholders of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989). The Court noted that the purchasers never acquiesced in the revaluation of the real property and that an appraisal is not required in all instances. The Court concluded that "in the absence of an adequate showing that the allocation agreement is unreasonable or that the appraisal more accurately reflects the fair market value of the property, the Tribunal's determination should be upheld." (Id.)

E. What is at issue here is the amount of the consideration paid for the acquisition of the stock of Fashion Barn that can be allocated to the real property that the entity owned in New York, for purposes of computing the gains tax liability. As previously stated, Tax Law § 1440(1)(a) defines "consideration," in pertinent part, as "the price paid or required to be paid for real property or any interest therein." "In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest," Tax Law § 1440(1)(c)

states, in pertinent part, that "consideration means that portion of the total consideration which represents the fair market value of such real property or interest."

The transfer here involved the purchase of 100% of the stock of Fashion Barn and so 100% of the purchase price must be allocated to the various assets purchased; New York real property, non-New York real property and non-real property. The remaining question is how to determine the fair market value of Fashion Barn's interest in the New York parcels.

F. The Tribunal has stated that the fair market value of real property is "the price at which a willing seller and a willing buyer will trade" (Matter of Shareholders of Beekman Country Club, Inc., supra; Matter of Bridgehampton Investors Corp., Tax Appeals Tribunal, August 11, 1988, quoting Black's Law Dictionary 717 [4th ed 1957]). Here, the parties have agreed that the Stock Purchase Agreement did not reasonably apportion the purchase price to the New York Parcels upon the acquisition of the stock of Fashion Barn.

Lacking a reasonable apportionment of the purchase price paid for the New York Parcels, the auditor initially computed the total consideration by adding the cash consideration set forth in the Stock Purchase Agreement of $6,200,000.00 to the maximum amount of liabilities set forth on the "Closing Date Statement" of $8,100,000.00. From the total consideration of $14,300,000.00, the auditor made two direct allocations: (1) the minimum amount of cash specified on the "Closing Date Statement", $200,000.00, was subtracted; and $5,586,000.00 attributable to inventory was subtracted. The remaining $8,514,000.00 was consideration subject to allocation among non-cash and non-inventory assets.

As the $8,514,000.00 was less than the $10,700,000.00 claimed by petitioners to be the fair market value of the New York Parcels, the auditor prepared an allocation of the $8,514,000.00 among the nine parcels of real property, auto and other vehicles and office equipment and supplies. The auditor used Fashion Barn's Bankruptcy Statement of Assets and Liabilities for the value of the nine parcels of real property and the other non-inventory assets. The total value of the New York Parcels according to the bankruptcy filing, $7,975,000.00, was divided by $10,803,800.00, the value of all non-cash and non-inventory assets, to arrive at a

percentage, 73.82%, which was then applied to the $8,514,000.00 consideration subject to allocation, resulting in consideration allocable to the New York Parcels of $6,285,035.00. The consideration was then allocated among the four New York Parcels based on the portion that the value of each parcel bore to the $7,975,000.00 total value of the New York property.

The auditor's allocation of consideration to the New York real properties is rational and consistent with the applicable provisions of Tax Law § 1440(1) and § 1440(5)(a). His determination is consistent with the Stock Purchase Agreement, the bankruptcy filings and accounts for all assets transferred in the stock sale. The auditor's allocation rationally reflects the circumstances surrounding the stock sale: Fashion Barn's financial difficulties; its soon to be filings for bankruptcy; the importance of the inventory in the stock sale to BAC; and the distress nature of the sale. In summary, the allocation of the Division rationally reflects "the price paid" for the New York Parcels.

G. Section 1440(1)(a) of the Tax Law provides that consideration is defined as "the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer." Subsections (b) and (c) apply to the particular class of transactions described therein. The first sentence of subsection (c) applies to this case because the purchase of the Fashion Barn stock was a mixed-asset transfer where there was no reasonable apportionment of the purchase price to the New York Parcels or any of the other five parcels of property.

Petitioners contend that the first sentence of section 1440(1)(c) is to be read independently of subsection (a) so as to require that the values set forth in the Coldwell Banker appraisals be used as the consideration paid to acquire the four New York properties. However, McKinney's Consolidated Laws of NY, Book 1, Statutes § 97 provides, in pertinent part:

> "It is a fundamental rule of statutory construction that a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent. . . . A general expression or a single sentence detached from its context does not reveal the purpose of the statute as a whole, and particular provisions, therefore, should not be torn from their places and, so isolated, be given a special meaning at variance with the general purpose and spirit of the enactment".

Petitioners' interpretation of section 1440(1)(c) as requiring the use of the appraisal values fails to take into account that the total consideration was only $14,300,00.00, and that figure included not only the New York properties, but $5,586,000.00 in inventory, five non-New York parcels and other personal property. Given the circumstances of the sale and the provisions of the Stock Purchase Agreement, the Division was justified in concluding that the assets of Fashion Barn other than inventory and cash were sold at a discount. Accordingly, the Division was justified in ignoring the appraisals and utilizing other information to compute the consideration paid to acquire the New York Parcels. If petitioners' interpretation of section 1440(1)(c) is applied to the situation of a transferor who transfers real property and other assets at a discount, the result is a consideration figure which equals fair market value but exceeds the price paid or required to be paid. Such a result clearly was not envisioned by the Legislature in enacting Article 31-B.

H. Based upon 20 NYCRR 590.47, petitioners argue that, in the case of a transfer of a controlling interest in an entity with an interest in real property, the proper method for determining the fair market value of the interest in real property is by appraisal. They then argue that since the auditor did not determine the fair market value of the interest in real property by appraisal it was unreasonable. 20 NYCRR 590.47(b) provides:

> (b) Question: How is fair market value determined?
>
> Answer: Generally, by appraisal. It is the amount a willing buyer would pay a willing seller for the real property. It is not 'net fair market value', which deducts mortgages on the property from fair market value."

Petitioners' reading of the regulation is not acceptable. A sale of assets usually requires the parties to allocate the sale price to the individual assets. In a stock sale, there is usually no reason to allocate the purchase price of the stock to the assets owned by the corporation. 20 NYCRR 590.47 recognizes this difference by acknowledging that in the case of a sale of a controlling interest, the determination of the fair market value allocated to the real property will generally be by appraisal. However, it does not express a preference for determination by appraisal to the exclusion of any other method of determining the fair market value of the real

property. Moreover, the regulation does not suggest that any appraisal is preferable to any other method of apportionment. The Division apportioned the consideration using the Stock Purchase Agreement and the bankruptcy papers of Fashion Barn. Petitioners now wish to utilize the appraisals to establish the fair market value of the New York Parcels. In order to do so, it is incumbent upon them to establish that the Division's apportionment was unreasonable. The mere fact that appraisal was not the Division's method used to determine the fair market value of the interest in real property does not establish that the method was unreasonable. In addition, the Division is not required to accept the Coldwell Banker appraisals as the method of determining the fair market value of the New York Parcels (Matter of Shareholders of Beekman Country Club, supra).

I. The Division's apportionment based on the relative value of the New York Parcels takes into account that portion of the total consideration which represents the fair market value of such real property or interest and is an entirely rational application of the first sentence of section 1440(1)(c). The Division's apportionment is consistent with the statute because it abides by the Stock Purchase Agreement where possible (the inventory) and uses documents filed by Fashion Barn in the bankruptcy proceedings. It also takes into account that this was a distress sale and that the stock was sold at a discount. All these facts and circumstances were not considered in the appraisal and all should have been considered under the circumstances presented in this matter in determining the price a willing buyer would pay a willing seller.

In sum, petitioners have failed to show that the auditor's apportionment of the consideration in the stock sale in determining Fashion Barn's original purchase price in the New York Parcels was unreasonable.

J. The Division assessed BAC and Consolidated on the transfer of the New York Parcels by Fashion Barn, claiming that each had a beneficial interest in the property and were thus liable for the gains tax due on the transfer of the New York Parcels to the unrelated third parties. In support of its position, the Division cites to Matter of Bredero Vast Goed N.V. v. Tax Commn., (146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). In

Bredero, the taxpayers were three public Netherland corporations which jointly owned a New York corporation which was an 85% general partner in a New York limited partnership. The limited partnership was the owner of a building in New York City. The taxpayers entered into an agreement to sell the stock of the New York corporation to a new general partner, and were assessed by the Division upon the transfer.

The Court upheld the Division's assessments, holding that the transaction was taxable pursuant to Tax Law Article 31-B. The Court went on to state that:

> "This court has previously recognized, however, that the statute (Tax Law § 1440[7], definition of transfer of real property) employs an expansive definition designed to maximize revenues (see, Matter of Iveli v. Tax Appeals Tribunal of State of NY, 145 AD2d 691, 535 NYS2d 234, lv. denied 73 NY2d 708, 540 NYS2d 1003, 538 NE2d 355 [Mar. 28, 1989]; Matter of Bombart v. Tax Commn. of State of NY, 132 AD2d 745, 516 NYS2d 989). The language utilized supports this construction. As noted above, the statute includes transfers of "any interest in real property by any method, including but not limited to" certain described formats (Tax Law § 1440[7]. . .). The definition is comprehensive, but not all inclusive, and evinces a legislative deferral to respondent's construction of the transfer concept. Here, respondent looked beyond the two-tiered nature of the conveyance and determined that petitioners "effectively" transferred an interest in the 342 Madison Avenue building. This construction keys into the economic realty that the partnership's sole asset consisted of the Madison Avenue property, and that the new 85% general partner, RPBLC, acquired a controlling interest in the real estate (see, 595 Investors Ltd. Partnership v. Biderman, 140 Misc.2d 441, 531 NYS2d 714). In our view, respondent's interpretation is entirely rational and we defer to that construction" (see, Matter of Mattone v. State of New York Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478) (Matter of Bredero Vast Goed N.V. v. Tax Commn., supra at 825).

The Bredero rationale is inapplicable to the circumstances surrounding the present matter. In Bredero, the Division chose to look "down" beyond the transferors and the two-tiered nature of the conveyance to determine that the transferors had "effectively" transferred their beneficial interest in the real property. In the present matter, the Division would like to look "up" from the transferor in an attempt to hold liable corporations that were owners of the transferor but were not the transferors of record. Bredero holds that it is appropriate to hold that a transferor has effectively transferred real property where there are entities tiered between the transferor and the real property, and in which the transferor has a controlling interest. It does not hold that the higher tiered entities of a transferor of real property are responsible for the tax due on the

transfer by the lower tiered entity, which is the transferor of the real property. Bredero does not support the Division's assessment of BAC and Consolidated for the gains tax due on the transfer by Fashion Barn.

K. The Division also contends that the "look-through" principle can be applied herein to hold both BAC and Consolidated liable for the tax due on the transfer. In Matter of Von-Mar Realty Co. (Tax Appeals Tribunal, December 19, 1991, confirmed 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803), the Tribunal summarized the application of the "look-through" principle by stating:

> "The 'look-through' principle, i.e., looking through an entity which owns real property to determine the beneficial owners of the real property, has been applied to the gains tax statutory scheme where adjacent or contiguous properties are transferred by two or more entities under common ownership to determine whether a taxable 'transfer of real property' has occurred (Matter of 307 McKibbon St. Realty Corp., supra). The 'look through principle' was also applied where a taxpayer and an entity in which it owns a 'controlling interest' transfer their interests in a single building with the result that the sales are aggregated to determine whether the $1 million exemption has been exceeded (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972). As we noted in these earlier decisions, the focus of the gains tax through entities pervades the entire statutory scheme imposing the tax (Matter of Howes, supra; Matter of 307 McKibbon St. Realty Corp., supra; see also, Bredero Vast Goed, N.V. v. Tax Commn. of the State of New York, 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105 [where the court sustained looking through two tiers of entities to find a transfer of real property])."

In the instance where the entity is the transferor, the Tribunal stated:

> "This exemption which looks through entities to exempt transfers based on beneficial ownership must necessarily be coupled with a similar look through the entity to determine beneficial ownership where, as here, an entity is selling real property. If not, the tax would be rendered a nullity through transactions structured in two steps, with the first step designed to benefit from the section 1443.5 exemption and the second from the less than $1 million exemption. For example, an individual or entity intending to sell a parcel of real property for more than $1 million to a third party could make intermediate transfers to entities it wholly owns. Such transfers would be entirely exempt from gains tax pursuant to the section 1443.5 exemption. If the commonly owned entities subsequently transferred to the intended transferee each for less than $1 million, the entire transaction would escape gains tax. Surely this was not a result intended by the Legislature. Accordingly, in the transaction at issue, the beneficial ownership of the interests in real property being transferred must be determined." (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972.)

When the "look-through" principle is applied, it is the transferor which remains liable for the gains tax due and is the entity which is assessed. As BAC and Consolidated were not the transferors of the New York Parcels, they are not liable for the gains tax due on the transfer.

L. The petitions of BAC and Consolidated are granted as indicated in Conclusions of Law "J" and "K", and the notices of determination issued to them on December 2, 1991 are cancelled; in all other respects their petitions are denied. The petition of Fashion Barn is denied, and the notice of determination issued to it on December 2, 1991 is sustained.

DATED: Troy, New York
June 17, 1996

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE